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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 864

ROBERT P. BURRUSS, ET AL., *Appellants*,

v.

WOODROW W. WILKERSON, STATE BOARD OF EDUCATION, ET AL., *Appellees*.

BRIEF FOR

National Education Association of the United States
The Lawyers' Committee for Civil Rights Under Law
The Urban Coalition

AS AMICI CURIAE

In Support of the Jurisdictional Statement

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In Support of the Jurisdictional Statement [1]

INTEREST OF AMICI

1. The National Education Association of the United States [NEA], founded in 1857, is a Corporation chartered by special Act of Congress in 1906. Its membership includes more than one million professional educators. Its purpose is to improve the character and advance the interests of the teaching profes-

[1] Counsel for Appellants have consented to the filing of this brief. Counsel for Appellees have indicated that they do not oppose its filing.

sion and to promote generally the cause of education in the United States. In furtherance of this purpose, the Association has long worked to insure the adequate and equitable financing of public education. For more than a century, NEA has striven to provide equal educational opportunity for all American children, in rural as well as in urban and suburban sections of the Nation.

2. The Lawyers' Committee for Civil Rights Under Law, a non-profit private corporation organized in 1963, is composed of over 300 lawyers across the country. In 1968, with the aid of a grant from the Ford Foundation, the Committee initiated a project to actively engage the services of lawyers in an attack upon problems in such areas as education, housing, and economic development. Well over 20,000 volunteer hours have been committed to over 600 projects. In the field of education, both national and local committees have undertaken more than a score of projects to promote quality education. For over a year, these committees have studied, reviewed, and proposed various provisions for reform of education financing. It is because of the importance of this case to the effort to bring about adequate systems of education financing that the Lawyers' Committee urges the Court to grant the requested relief.

3. The Urban Coalition, a private non-profit corporation, has established as one of its major objectives the extension of quality education, particularly to those students from disadvantaged backgrounds. Essential to this task is the removal of the gross inequities resulting from state education finance formulae which presently favor suburban areas at the expense of rural and urban areas. The present case challenges certain fea-

tures of the education financing system of the Commonwealth of Virginia. However, the factual pattern which the case presents and the important Constitutional issues it raises extend to States across the Nation. It is for this reason—because of the importance of this case to the future of American education—that the Urban Coalition requests this Court to grant the relief sought by Appellants.

QUESTIONS PRESENTED

1. Whether the District Court erred in dismissing Appellants' claim that the Equal Protection Clause of the Fourteenth Amendment is violated by certain specific features of the formula by which the Commonwealth of Virginia apportions its educational resources between the public school children of Bath County and similarly situated counties, on the one hand, and those in more affluent urban and suburban counties.

2. Whether the District Court erred in holding that the decision in *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd per curiam sub nom. *McInnis* v. *Ogilvie*, 394 U.S. 322 (1969), insulates from judicial scrutiny the statutory formula challenged here.

STATEMENT OF THE CASE

Appellants filed this civil proceeding in the United States District Court for the Western District of Virginia, Harrisonburg Division, seeking declaratory and injunctive relief with respect to the formula by which the Commonwealth of Virginia apportions aid among its public schools. The complaint alleged with particularity that the public school children of Bath County, Virginia, and similarly situated counties [hereinafter Appellants], were deprived of their rights under the Equal Protection Clause of the Fourteenth Amend-

ment as a result of the interplay of state law and the County's poverty.

On November 16, 1968, almost simultaneously with the District Court decision in *McInnis* v. *Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968), United States District Judge Ted Dalton held that Appellants were entitled to a three-judge court to pass upon the validity of their claims. (J.S. App. B) After taking testimony and other evidence with respect to the educational situation in Bath County and its relationship to the formula by which the Commonwealth of Virginia apportions educational resources, the three-judge court asked counsel for both sides to address themselves to the decision in *McInnis* and its per curiam affirmance by this Court, and to discuss possible judicial remedies for the conceded educational deficiencies found in Bath County. Counsel for appellees responded, resting their defense squarely and exclusively upon *McInnis.* Appellants filed a memorandum distinguishing *McInnis,* and proposing appropriate judicial remedies.

On May 27, 1969, the three-judge court filed its opinion, dismissing the complaint. (J. S. App. A) The court conceded the existence of "marked deficiencies of the Bath County School physical and instructional facilities, when compared with those of the other political subdivisions in Virginia." (J. S. 4a) But it concluded, following *McInnis,* that no relief was available. The court said that

> "[W]e do not believe that [the deficiencies and differences] are creatures of discrimination by the State. Our reexamination of the Act confirms that the cities and counties receive State funds under a uniform and consistent plan. With this conclusion we resolve the chief issue of the case, and exposition of the method of computation is not necessary. . . .

"Truth is, the inequalities suffered by the school children of Bath are due to the inability of the county to obtain, locally, the moneys needed to be added to the State contribution to raise the educational provisions to the level of that of some of the other counties or cities. The blame cannot be placed on the people or the officials of the county. Rather it is ascribable solely to the absence of taxable values sufficient to produce the required moneys. The tax rate and the appropriations have been strained to afford the children better schools." (J. S. 4a)

SUMMARY OF ARGUMENT

First, the state laws challenged below have the effect of depriving Appellants of their rights under the Equal Protection Clause of the Fourteenth Amendment. (1) These laws concededly deny to Appellants desperately needed state supplements to teachers' salaries, and other forms of state assistance, which are accorded to more affluent urban and suburban counties. (2) They reduce Appellants to the use of educational facilities branded "substandard" by state authorities, which may contribute to the system's lack of accreditation, and whose improvement, the Commonwealth admits, is beyond the County's resources. (3) And they make it impossible for Appellants to obtain *either* adequate vocational training *or* a curriculum broad enough to render graduates of the County's schools eligible to attend state institutions of higher learning. As a result, Bath County's young people are deprived of educational incentive and are relegated to poorly paid work as domestics or unskilled laborers, the County's Appalachian poverty is made self-perpetuating, and the gulf between rich and poor areas of the Commonwealth is maintained and widened.

Second, the present case affords a timely and appropriate vehicle for mitigating the chilling effect of the decision in *McInnis* v. *Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), aff'd per curiam sub nom. *McInnis* v. *Ogilvie*, 394 U.S. 322 (1969). As the present case illustrates, the District Court decision in *McInnis*, and its summary affirmance by this Court, have induced lower federal and state courts indiscriminately to reject efforts to measure state formulae for financing public education by the requirements of the Equal Protection Clause. Until this Court indicates that its summary affirmance in *McInnis* was not intended to have this deadening effect, litigants, whether in Appalachia or in urban areas, will find it unduly difficult, if not impossible, to obtain the judicial relief to which they are entitled. We believe this case a highly appropriate vehicle for mitigating the overkill effect of *McInnis*.

ARGUMENT

I. The District Court erred in dismissing Appellants' claim that the Equal Protection Clause of the Fourteenth Amendment is violated by certain specific features of the formula by which the Commonwealth of Virginia apportions its educational resources between Appellants, on the one hand, and public school children in more affluent urban and suburban counties.

The District Court agreed that Bath County is a poor county, and that its poverty is related to the "deficiencies and differences" which characterize its educational system. And the court commended the County and its people for straining their own financial resources to the legal and practical maximum. (J. S. 4a) But the court concluded that because school districts in Virginia receive state funds "under a uniform and consistent plan," there was no violation of the

Equal Protection Clause of the Fourteenth Amendment. (*Ibid.*)

In this respect, the court was in error. Bath County, located in the southwestern portion of the state, is indeed a poor county.[2] As the record shows, nearly half of the County's families have an income of under $3000. (Tr. 27) Principal occupations are serving as domestics at The Homestead resort and working as laborers in the County's forests. The County has no public library, no theatres, no public tennis courts or golf courses, and no public swimming pools. (Tr. 70)

The County now taxes itself at the maximum level permitted by state law, and this year will spend 93 percent of its total tax revenues on its school system. (Tr. 104)

As a result of the interplay of the County's poverty and the way in which otherwise uniform and consistent state laws operate, Appellants are denied equal opportunities as compared to those afforded public school children in more affluent urban and suburban parts of the Commonwealth.

This brief will focus on several key discriminations resulting from the interplay of poverty and state law.

1. *Salary Assistance:* Because of its geographical location and its poverty, Bath County is unable to recruit a full staff of accredited teachers. In average teacher's salary, the County ranks 113th of 127 in Virginia. (Tr. 30) In percentage of teachers with advanced degrees, the County places 119th.

Instead of compensating for these inadequacies, Virginia law visits harsh financial penalties upon the

[2] An "Appalachian County" for purposes of the Appalachian Regional Development Act of 1965, P.L. 89-4, 79 Stat. 5, 40 U.S.C. —, App. § 1 et seq. See Tr. 21.

County because of them. The Commonwealth has legislated a state salary supplement in the amount of 60 percent of teachers' salaries—the principal form of state financial aid to public education. But state assistance is adjusted *downward* in relationship to the number of unaccredited teachers and to the extent that the number of students per class drops below 30 in elementary school and 23 in high school. 1968 Acts of Assembly, Ch. 806, Item 564. These penalty provisions presumably have the otherwise laudatory purpose of providing incentives for school districts to hire only accredited teachers and to use their resources efficiently.

But in the circumstances in Bath County, the incentive system not only breaks down, but works in reverse. Sixteen of the County's 53 teachers are unaccredited and therefore ineligible to receive any form of state salary supplement. (Tr. 15-16) And the County cannot aggregate the necessary number of students per classroom; the County is sparsely settled and carved up by beautiful but inconveniently placed mountains.[3] (Tr. 14-16) As a result, the state salary assistance program strips Bath County of desperately needed state funds—which *are* paid to more affluent school districts.

Other forms of salary assistance are likewise denied Bath County, but granted less needy school districts. Virginia, for example, provides a 60 percent supplement to salaries of principals (item 560), other supervisory personnel (item 557) and vocational training and other special teachers (item 558). But Bath County cannot afford principals or assistant principals in its elementary schools, and has no supervisors of

[3] The topography makes consolidation of school districts or schools not feasible.

instruction, vocational training teachers, or visiting specialists. (Tr. 15, 73-74) Nor is the County able to earn its share of state matching grants for vocational training equipment. (Tr. 73-74, 113) It is simply not affluent enough to gain access to state aid.

No one would suggest that Virginia could permissibly provide mortgage assistance to all homeowners, *provided* they live in $40,000 homes. The state supplement program is precisely analogous, and it is equally unconstitutional as applied to Bath County.

2. *Curriculum Deficiencies.* As a consequence of its own poverty and the partial denial to it of state salary and other assistance, the County is unable to offer a curriculum which will help break the cycle of poverty. Because of the lack of funds and the expensive nature of this kind of education, Bath County is unable to offer technical vocational training. (Tr. 74) Nor is it able to provide a curriculum which has a sufficient range of courses to entitle graduates of the County's schools to enter such state institutions of higher learning as William and Mary College (Tr. 79).[4] A great many institutions,[5] moreover, require applicants to come from accredited high schools, and the Bath County schools are unaccredited. See *Proceedings of 72d Annual Meeting of the Southern Association of Colleges and Schools*, Dallas, Texas, November 1967. As a result, students drop out in large numbers to take such dead-end jobs as caddying at The Homestead. (Tr. 78)

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[4] Bath County schools offer but 39.5 units compared to the statewide average of over 62, and a figure for Fairfax County of 137. (Tr. 30-31)

[5] We are advised, however, that Virginia's own state institutions accept accreditation by the Commonwealth itself, which Bath County schools have been given.

It was conceded below that it is not within the power of the County, unaided, to correct these curriculum deficiencies. We contend that so long as Virginia maintains institutions of higher learning open to high school graduates who have taken the required courses, it must insure that schools in each and every county offer at least the curriculum necessary to meet the entrance requirements set by such state institutions. See *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). As this Court said in *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954), "[W]here the State has undertaken to provide [public education, it] is a right which must be made available to all on equal terms."

3. *School Plant*: Bath County, as a result of its poverty, is forced to use a substantial number of educational facilities which the Commonwealth's own experts have ruled "substandard". These include school cafeterias with earthen floors! Since adequate school plant is one of the criteria which determine a school system's accreditation,[6] the deficiencies in Bath County's school plant may be a factor in rendering its graduates ineligible for admission to some institutions of higher learning. Affluent counties, able to raise funds for school construction, receive some state assistance with respect to interest costs. (Tr. 147) But the Commonwealth provides no funds for construction of local school facilities—even to eliminate concededly "substandard" facilities. Here again, state law aids the rich while declining to aid the poor.

* * *

[6] United States Office of Education, Approval and Accreditation of Public Schools, p. 15 (1960).

Certainly it cannot be said that the Court below subjected these discriminatory effects to the "careful examination . . . warranted where lines are drawn on the basis of wealth. . . ." *McDonald* v. *Board of Election*, 394 U.S. 802 (1969); *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 670 (1966); *Douglas* v. *California*, 372 U.S. 353 (1963).

Each of the aforementioned evils is susceptible of remedy by a simple, easily enforceable court order. (1) The District Court should suspend application to Bath County and similarly situated counties of the penalty provisions whose effect is to deprive the County of its share of state salary assistance. The Commonwealth should be required to provide 60 percent of teachers' salaries here, just as it does in Fairfax and in other affluent counties, without regard to the number of unaccredited teachers or to deviations in class size. These are concededly circumstances not within the County's control, and may not be made the basis for penalizing the County financially. (2) Similarly, Virginia should be required to do whatever is necessary, providing special funds or visiting faculty, in order to enable the County to offer a curriculum which will at least make its high school graduates eligible to meet the entrance requirements set by William and Mary College, and like state institutions. (3) Finally, it should be required to provide the funds necessary to correct conceded deficiencies in Bath County's physical facilities, at least to the extent these affect the system's accreditation.

II. The District Court erred in concluding that the decision in McInnis and its summary affirmance by this Court insulate from judicial scrutiny the statutory formula challenged here.

One of the most distressing circumstances to those working to improve the quantity and quality of American education is the way in which *McInnis* and its summary affirmance by this Court have been held to shut the door to efforts to challenge state formulae for apportioning educational resources. The present case is but one example of the unnecessarily chilling effect of *McInnis*.[7]

Although we did join as *amici* to urge this Court to note probable jurisdiction in *McInnis*, it is not necessary for us now to quarrel with the decision reached there. *McInnis* is easily distinguishable from the present case, despite the reluctance of lower courts to observe the distinctions.

1. *McInnis* was a decision on a bare complaint, supplemented only by legal memoranda; no factual materials were adduced. In the present case, on the other hand, a full set of facts was put into the record, including abundant documentation, live testimony and factual concessions by the Commonwealth.

2. In *McInnis*, the court rejected what it deemed the "nebulous concept" under which plaintiffs there sought to require allocation of state funds solely on the basis of the "educational needs" of students. The

[7] In addition to the present case, see *Serrano* v. *Priest*, No. 938254, Calif. Super. Ct. (L.A. Co. 1969), dismissed on the basis of the lower court decision in *McInnis*. Moreover, cases in other jurisdictions, at least in part, are not being filed or pressed for fear *McInnis* will lead to their quick dismissal. See, e.g., *Board of Educ. of City of Detroit, Mich.* v. *Michigan*, No. 103342, Circuit Ct. for Wayne County, Mich.; *Rodriquez* v. *San Antonio Independent School District*, No. 68-175 S.A. (W.D. Tex.); *Bellow* v. *Wisconsin*, No. — , Dane County Cir. Ct., Wis.

District Court concluded that it lacked the means to ascertain what those needs were, and the ability to fashion a decree to implement such a standard. In the present case, on the other hand, Appellants ask only that they not be penalized because of the poverty of the County. Bath County should receive only the same state salary assistance that more affluent counties receive—without regard to penalties triggered by the County's poverty. The Commonwealth should insure that Bath County is able to offer a curriculum which at least equips graduates to apply for admission to William and Mary College and like state institutions, and that the County's physical facilities are raised to levels which the Commonwealth's own inspectors will concede to be not "substandard."

3. In *McInnis*, the District Court emphasized that Illinois guaranteed that each school district would expend at least $400 per pupil, and that the legislature periodically raised the floor. Virginia guarantees no such minimum expenditure per pupil.[8] And its legislature, as the record here demonstrates, has steadfastly rejected recommendations by distinguished commissions that it do more for poor school districts.[9]

5. The *McInnis* court observed that under the Illinois statutory scheme, each school system has an opportunity to choose what portion of local revenues are to be devoted to education as opposed to other public needs. It held this decision "reasonable, especially since the common school fund assures a minimum of $400 per student." 293 F. Supp., at 333.

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[8] This statement must be qualified. In the unlikely event that the Commonwealth's contribution of 60 percent of salaries yields less than $110 per pupil, that amount will be furnished in lieu of teacher aid.

[9] See, e.g., the Turner Commission Report of 1967.

Here, not only does the Commonwealth provide Bath County with no such $400 floor, but the County will this year spend 93 percent of all local revenues on education, is already taxing itself at the maximum level permitted by state law, and therefore does not have the luxury of choosing between education and other public needs. Even the County's single-minded concentration on education leaves it woefully short of educational funds.

In sum, *McInnis* and the present case are worlds apart. Here Appellants proceed on an entirely different theory, focusing on equal educational opportunities and facilities rather than arguably difficult-to-define student educational needs. Here, the interplay of Virginia's statutory formula and Bath County's poverty is well documented, and indeed is conceded.

We do not, of course, know why this Court declined to review *McInnis*. It may have balked at the lack of a factual record. It may have been troubled by the request that it relate state educational expenditures to the "educational needs" of students. It may have been influenced by the $400 per pupil floor guaranteed by the state legislature to all school districts. Or it may have been persuaded that the Illinois legislature was facing up to the State's educational needs.

Whatever the reasons, none of them applies to the present case, and the Court below was in error in following *McInnis*.[10] We believe that it is vital that this Court now make clear that *McInnis* was not intended to shut the door to judicial review of all formulae by which the states apportion funds among school districts. *McInnis* has already had a substantial

[10] Of course, even if *McInnis* were squarely in point, this Court would not be precluded by its summary affirmance in that case from setting this one for plenary review. *See The Sunday Law Cases*, 366 U.S. 420, 511, (1961).

chilling effect on school litigation. The present case is, we believe, a highly appropriate one for demonstrating that the courts *are* open to measure state formulae for apportioning educational resources by the standards of the Equal Protection Clause.

CONCLUSION

We believe the record in this case requires reversal of the decision of the District Court and the entry of appropriate relief. Should the Court not wish to undertake the latter step, we believe it would be a substantial service to American education and especially to the school children of rural counties like Bath, were this Court simply to remand to the District Court with instructions to fashion relief so as to prevent the interplay of poverty and state law from violating the Fourteenth Amendment rights of the children.

Respectfully submitted.

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